IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 401 OF 2002

Ramchandra Anayaba Bansode
Since deceased through his legal
Heirs and respresentatives
Shri Dharmu Ramchandra Bansode
and ors. ..Appellants

Vs.

1. Shri Tanaji Natha Bansode
and ors. ..Respondents

Mr. R.V. Bansode for appellants.

CORAM: B.H. MARLAPALLE, J.

Date : June 20, 2007.

P.C.:

1. Heard Mr. Bansode the learned counsel for the appellants-original defendants. This second appeal arises from the decree of partition passed by the learned 2nd Additional District Judge at Satara on 29/1/2002 by allowing Regular Civil Appeal No. 370 of 1996. The present respondents - original plaintiffs had filed Regular Civil Suit No. 46 of 1983 for partition and separate possession. The suit properties as mentioned in para no. 1 of the plaint

were eight agricultural lands, suit house bearing Village Panchayat No. 266 (New 306). The defendants - present appellants had filed their Written Statement at Exh.16 and opposed the suit and more particularly contended that the agricultural land in Survey No.45 out of the eight suit lands and Village Panchayat House No. 266 were the self acquired property of their father Ramchandra. The Plaintiff No.2 stepped in the witness box as PW 1 and similarly Defendant No.1 was examined as DW 1 in support of the defendants' case. By taking into consideration the oral as well as documentary evidence, the trial court discarded the contention of the defendants that the agricultural land in Survey No.45 and Village Panchayat House No.266 were the self acquired property of Ramchandra. The trial court further held that all the suit properties were joint family properties of the plaintiffs and defendants and each of the parties were entitled for an equal 1/2 share. The defendants had also raised an alternative plea of adverse possession over agricultural land in Survey No.45 and Village Panchayat House No.266 and the same also was discarded by the trial court. However, the trial

court denied the decree of partition only on the ground that the plaintiffs had not included one more house property which was located in the same village i.e. Bhalwadi where the Village Panchayat House No. 266 is also located. This finding of the trial court that all the suit properties were joint family properties and the plaintiffs and defendants were entitled to have 1/2 share each were not challenged by the defendants by filing an appeal in the first appellate court and on the contrary, the plaintiffs alone approached the Lower Appellate Court challenging the view taken by the trial court that the decree of partition was denied solely on the ground of non-joinder of properties. Under these circumstances, the defendants now cannot challenge the trial court's findings that all the suit properties were joint family properties and the plaintiffs and the defendants were entitled for 1/2 share each in the said properties, more so when the Lower Appellate Court has also confirmed the said findings.

2. Therefore, in this second appeal,the only issue that will require to be considered is, whether

the Lower Appellate Court was right in holding that the trial court was in error in denying the decree for partition solely on the ground of non-joinder of property i.e. one house property. The Lower Appellate Court referred to the depositions of PW 1 and more particularly his cross-examination, in which he stated that both the family at the relevant time, when he was in the witness box, were staying in the farm house and there were two joint properties in village Bhalwadi. Village Panchayat House No.266 was in possession of the defendants and the other house was in possession of the plaintiffs. The village house property which was in the possession of the plaintiffs was not included in the suit properties. The Lower Appellate Court referred to the further depositions of the DW 1 that the said house is in possession of the defendants was in a dilapidated condition, none of the families were occupying any of these house at the relevant time and they were staying in the farm house. If the house in possession of the defendants had collapsed as stated by DW 1 in his cross-examination, it was not worth for effecting a partition and at the most it could be a plot of land.

The Lower Appellate Court, therefore, held that the same could be added in the common pool as a plot of land and the Collector would effect the partition and, therefore, it was erroneous on the part of the trial court to deny the decree of partition only on this ground. The decree passed by the Lower Appellate Court reads as under:-

> (a) The suit filed by the Appellants is hereby decree. It is hereby declared that the appellants and respondents have got 1/2 share each in the suit house and landed property.
>
> (b) The appellants be put in separate possession of 1/2 share in the suit landed property by effecting partition. The Collector, Satara or any Sub Ordinate Gazetted Officer shall effect partition as per Sec. 54 of the C.P.C.
>
> (c) The partition of house property shall be effected by the Court Commissioner appointed in the execution of the decree. Thereafter,

the appellants be put in separate possession of 1/2 share in it.

(d) The respondents are entitled to get their share on payment of requisite Court fee stamp.

3. The observations of the Lower Appellate Court in holding that exclusion of one collapsed house cannot be a reason to deny the decree of partition reads as under:-

"....The D.W.1 admitted in the cross examination that the house is practically collapsed. If the parties intend to enforce right over that house in future there may not be any reason to file a separate suit and when both of them admit that it is an ancestral house. It may also be noted that if on that count the right of the appellant in the suit property is denied forever they will be deprived of their share in the suit property.

> Parties may conveniently divide the house property remained to be included in the suit in future. It has also come on record that the appellants even did not know the house number of the dilapidated house. Therefore, the question also arises whether it really belongs to the joint family of the parties. Taking into consideration of all above facts, I am of the opinion that even if dilapidated house assuming that it is a joint family property is not included in the suit, the suit is maintainable....."

4. The learned counsel for the appellants relied upon the decision in the case of Kenchegowda (since deceased) by Legal Representatives vs. Siddegowda alias Motegowda [(1994) 4 SCC 294]. In para 16 of the said Judgment, the Apex Court while referring to the facts in that case stated,

> "...Even otherwise, a suit for partial partition in the absence of the inclusion of

> other joint family properties and the impleadment of the other co-sharers was not warranted in law...."

5. In the instant case the trial court has not held that the suit was not maintainable on account of non-joinder of a party, instead the trial court held that the suit properties were not liable to be partitioned because of non inclusion of one property and the Lower Appellate Court considered the evidence of PW 1 as well as DW 1 and having regards to the fact that the house property which was not included was a dilapidated house in possession of the plaintiffs. It further held that it could be included in the common pool of properties while effecting the partition by the Court Commissioner appointed and, therefore, the plaintiffs were directed to remit additional court fees.

6. No other substantial question of law arises for consideration in this second appeal which has been waiting for admission for the last more than five

years.

7. Hence, the appeal is dismissed in limine.

(B.H. Marlapalle,J.)